



August 20, 2002

Mr. Jay Youngblood
Henslee, Fowler, Hepworth & Schwartz
110 North College Avenue, Suite 1116
Tyler, Texas 75702

OR2002-4630

Dear Mr. Youngblood:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 167406.

The Winona Independent School District (the "district"), which you represent, received a request for all information relating to an investigation regarding a former district employee. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.117, and 552.135 of the Government Code in addition to the Family Educational Rights and Privacy Act ("FERPA").¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that exhibits A-H consist of a completed investigation of allegedly inappropriate actions of the district employee in question. Completed investigations are subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) states that a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is not excepted from disclosure unless expressly confidential under other law or as provided by section 552.108. You assert that these exhibits are excepted under sections 552.101, 552.103, 552.117, and 552.135. Section 552.103 is a discretionary exception under the Public Information Act and is, therefore, not "other law" for purposes

¹We note that you did not raise section 552.135 by number within the ten-day period required by section 552.301(b); however, as you raised section 552.135 by its title, we will consider your assertions under that section.

of section 552.022.² See Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential). We will, however, address the applicability of your other claimed exceptions which are considered "other law" for purposes of section 552.022.

The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. See 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. In this instance, however, you have submitted the information at issue for our review. Consequently, we will determine whether any of the submitted information is protected by FERPA.

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." See

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., Open Records Decision No. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

Open Records Decision Nos. 332 (1982), 206 (1978). We have marked the types of information in exhibits B, C, D, and G that may reveal or tend to reveal information about a student that must be withheld pursuant to FERPA. We note that for purposes of FERPA, students' handwritten letters constitute "education records" in that they contain information about identifiable students. *See* Open Records Decision No. 224 (1979) (student's handwritten comments that would make identity of student easily traceable through handwriting, style of expression, or particular incidents related in comments protected under FERPA). We have marked the handwritten letters and statements in attachments C and D that must be withheld in their entirety pursuant to sections 552.026 and 552.114 of the Government Code. We also note some of the submitted information relates to a particular incident involving a specific student. The requestor would be able to identify the student based on the particular incident even if the student's identity alone were withheld. Accordingly, we have marked the documents in exhibit C relating to the specific student that must be withheld in their entirety in order to protect the identity of the student involved in the particular incident. Finally, we point out that exhibit H, which you assert is excepted from release under FERPA, consists of nine microcassette tapes. We note that we were unable to understand all of the tapes due to poor audio quality.³ We did, however, find one microcassette that we have marked containing information identifying a student that must be withheld under FERPA. Accordingly, we find that prior to releasing copies of any of the nine microcassettes to the requestor, you must erase all student identifying information included on the microcassettes under FERPA.

You also assert that information included in exhibits A-H is excepted from release under section 552.135 of the Government Code, which provides as follows:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

³The submitted microcassettes were marked "copy;" we assume that the audio fidelity is superior on the original microcassettes.

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Here, the district claims that exhibits A-H contain information provided to it by "individuals [who] could be considered 'informers'" regarding a district educator's violations of state law as set forth in exhibit M. However, the district does not identify the "informants." Because the district has not named any specific individuals whose identities it seeks to withhold, we conclude that the district may not withhold any portion of exhibits A-H under section 552.135.

Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, the district may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the district must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The district may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential. We have marked the information in exhibit G that may be protected under section 552.117.

We now consider your assertion that exhibit I is excepted from release under section 552.103. The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986)*. To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than

mere conjecture.” *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You inform us that the requested information relates to a hearing requested pursuant to section 21.253 of the Education Code by the requestor contesting his recent termination as demonstrated in exhibit N. According to section 21.256(e) of the Education Code, hearings requested under section 21.253 “shall be conducted in the same manner as a trial without a jury in a district court of [Texas].” This section also specifically affords the person making the appeal the right to be represented by a representative of his/her own choice, to hear evidence on which the charge is based, to cross-examine each adverse witness, and to present evidence. It also states that the Texas Rules of Civil Evidence apply at the hearing. *See* Educ. Code § 21.256. Accordingly, we find that the hearing under section 21.253 of the Education Code constitutes litigation for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concluding that contested case under Administrative Procedure Act, Gov’t Code ch. 2001, qualifies as litigation under statutory predecessor), 301 (1982) (concluding that litigation includes a contested case before an administrative agency). For section 552.103 to apply, however, litigation must be reasonably anticipated on the date that the governmental body receives the request for information. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref’d n.r.e.); Open Records Decision No. 551 at 4 (1990). The district argues that exhibits J-M establish that litigation was reasonably anticipated at the time the district received the request for information. Exhibits J-M relate to termination proceedings before the school superintendent and the school board. These exhibits indicate that though the requestor possessed the option of appealing an adverse board decision to the Board of Education, it was not until the requestor actually filed his notice of appeal that a concrete step had been taken such that litigation could reasonably be anticipated. We note that the district did not receive notice of the requestor’s appeal under section 21.253 until June 20, 2002, seventeen days after the date it received the open records request. Accordingly, we find that the district has not demonstrated that litigation was reasonably anticipated at the time it received the request. Consequently, you may not withhold exhibit I under section 552.103. As you raise no other arguments against release of exhibit I, you must release exhibit I.

In summary, we find that exhibits A-H are made public under section 552.022(a)(1) as a completed investigation. However, we find that portions of exhibits A-H must be withheld under other law. First, you must withhold the marked information that identifies students under FERPA in exhibits B, C, D, and G, including all of the letters handwritten by students included in exhibits C and D. You must withhold the documents in exhibit C in their entirety that identify a specific student involved in a particular incident known to the requestor. You

must also erase all student identifying information from the submitted microcassettes under FERPA prior to releasing copies of the microcassettes to the requestor. You may not withhold any of the submitted information under section 552.135. You may need to withhold the marked personal information in exhibit G provided the district employees timely requested that this information remain confidential. Finally, you may not withhold exhibit I under section 552.103.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Maverick F. Fisher".

Maverick F. Fisher
Assistant Attorney General
Open Records Division

MFF/seg

Ref: ID# 167406

Enc. Submitted documents

c: Mr. Trey Yarbrough
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(w/o enclosures)